United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

334

No. 17,285

SYLVIA O. COOPER,

Appellant,

v.

JACOB C. LISH (Agent for)
SUPER SALVAGE COMPANY,
a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. SPRIGGS, JR.
614 Indiana Avenue, N.W.
Washington 4, D. C.
Attorney for Appellant

STATEMENT OF QUESTIONS PRESENTED

1. Was it error to grant summary judgment when the pleadings disclose genuine issues of material facts at issue?

2. Can a successor Judge set aside, vacate or annul a denial of a motion to dismiss on the motion for summary judgment based on the same facts and circumstances as the motion to dismiss which the prior judge had denied?

3. Does the doctrine of "res judicata" or "collateral estoppel" prevent granting of summary judgment on same facts denied by motion to dismiss?

4. Does the Workmen's Compensation Act of the District of Columbia deny appellant a right of action for loss of consortium with her deceased common law husband?

5. Does the Workmen's Compensation Act of the District of Columbia apply to representatives of a deceased employee who have been found by the Compensation Commission to be outside the jurisdiction of the said Act?

6. Do the exceptions set forth in 36 DC Code Section 502 and 44 DC Code Section 401 apply to appellant herein?

TOPICAL INDEX

TABLE OF CASES

---

* Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,285

SYLVIA O. COOPER,

Appellant,

v.

JACOB C. LISH

SUPER SALVAGE COMPANY,
a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action was instituted by Sylvia O. Cooper, a citizen of the United States now residing in the District of Columbia being a civil action in tort for damages resulting from negligence of the appellee

and for the wrongful death of Donald N. Cooper, deceased. On July 13, 1962, the Court below granted a summary judgment to the appellee. Notice of appeal was filed 13 August 1962.

The jurisdiction of this Court is invoked by virtue of Sections 1291 and 1294 of the Act of June 25, 1948, Ch. 646 (62 Stat. 869, 929, 930): 28 U.S.C. Sections 1291 - 1294 (1) relating to appeals.

STATEMENT OF FACTS

Appellant, Sylvia Cooper, on April 21, 1956, entered into a marriage ceremony with Donald N. Cooper, deceased, in the State of Maryland (J.A. 13). Both parties had previously been married and both parties at the time of their second marriage thought they had been legally divorced (J.A. 14). Both parties after the marriage ceremony lived together in Maryland as husband and wife until the year of 1959 when they moved into the District of Columbia where they continued to live together as husband and wife until the death of Donald N. Cooper (J.A. 6).

During all of this time Donald N. Cooper was employed by the appellee.he earned an excess of $105.00 weekly. Together they were buying their home in the District. Donald N. Cooper had conceived two children by his first wife and four children with the appellant. After his death it was discovered that though he received papers in 1954 indicating his divorce, nevertheless the final decree had not been entered in the Court records until June 28, 1957, a little over a year after his marriage ceremony with the appellant (J.A. 6).

After the death,the Workmen's Compensation Commission sent forms to appellant which she, through her attorney, filled out and returned. Thereafter the appellee requested an informal conference with the District's Workmen's Compensation Commission to determine his dependents (J.A. 15, 16).

As a result of that conference the Compensation Commission determined that the appellant was not legally married to the decedent presumably

because of the marriage and divorce law of the State of Maryland (J.A. 16).

In this manner the appellant was placed outside the jurisdiction of the Compensation Statutes and deprived of the Workmen's Compensation benefits the appellee now claims to have been due her, which was her only remedy under the law. Whereupon, appellant, after learning that she did not come within the jurisdiction of the Workmen's Compensation Statutes, filed this action for loss of consortium. Appellee, immediately filed a motion to dismiss the action on the inconsistent ground that while appellant was not the wife of the deceased, the Compensation Statute was her sole and exclusive remedy; a hearing was held on the motion to dismiss and the motion was denied. Appellee did not ask for a reconsideration of the motion but instead, waited for a rotation of the judges and filed for a summary judgment before the successor judge on the same grounds.

This motion was granted and this appeal followed.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Sections 901 et seq) as applied to the District of Columbia,(36 D.C. Code Sections 501 et seq) 44 D.C. Code Section 401; 11 D.C. Code Sections 306; 16 D.C. Code 1201.

STATEMENT OF POINTS ON APPEAL

1. The Court erred in granting defendant (appellee herein), motion for summary judgment when the pleadings clearly show the existence of genuine issues of fact at issue.

2. The Court erred in creating a conflict within the jurisdiction, by reversing the decision of a District Judge sitting in the same Court, by granting summary judgment on the same issues decided by that judge when denying appellee's motion to dismiss complaint.

3. Issues decided by the Court, by one judge in denying motion to dismiss is res judicata as to the same issues sought to be attached collaterally by presenting those same issues to another judge by motion for a summary judgment.

4. Court erred in granting summary judgment when the facts clearly show that the appellant's suit was outside the purview of the Long Shoremen's and Harbor Workers Compensation Act (33 U.S.C. 901, et seq) made applicable to the District of Columbia (D.C. Code, 36--501, et seq).

5. The common law injury to the appellant was a wrong independent of injury to the deceased, Donald Nathaniel Cooper, whose death was caused by the negligence of his employer.

6. Court below erred in granting summary judgment to appellee when the effect of it denied appellant her common law damages for loss of her consortium with Donald Nathaniel Cooper.

7. Court erred in granting summary judgment to appellee which in effect held that Section 905 of the Long Shoreman's and Harbor Workers Act made applicable to the District of Columbia provided the exclusive remedy for appellant and liability for appellee as it relates to this cause of action.

8. Court erred in granting summary judgment the effect of which was a holding that appellant's (ruled not to be the widow or wife of the deceased within the Compensation Statute by the Commission) loss of consortium was a compensable injury within the scope of the Compensation Act and as a consequence appellant's remedy was excluded by said Act.

9. Court erred by granting summary judgment to appellee the effect of which denied appellant the equal protection of the law and due process of law guaranteed to her by the Federal Constitution.

10. Court erred by not holding that the Compensation Act was not superseded and modified by Title 12 Section 101 and Title 16 Section 1201 of the D. C. Code which expressly provides appellant with an action for negligence causing death.

11. Court erred in granting summary judgment therein denying appellant her Constitutional right to a jury trial of factual questions as to whether deceased came within the exceptions in the Compensation Act as set forth in Section 502 Title 36 D. C. Code and by Title 44 Section 401 of the said D. C. Code, setting forth liability of Common Carriers.

SUMMARY OF ARGUMENT

Appellant, in her action against the appellee has alleged that she was outside the jurisdiction of the Longshoremen's and Harbor Workers Compensation Act (33 U.S.C. Sec. 901 et seq) as applied to the District of Columbia (36 D.C. Code Sec. 501 et seq) that because she was precluded from benefits under the Act because she had been found not to be the wife of Donald N. Cooper deceased, at the time of his death. She was,however, at the time cohabitating with him legally and therefore was entitled to sue in tort for loss of consortium.

That the denial of appellee's motion to dismiss by the U. S. District Court for the District of Columbia was "res judicata" as to the same facts set forth in appellee's motion for summary judgment. He was,therefore estopped from setting up the same facts for determination before a successor judge of the same Court by motion for summary judgment. This Court has determined a motion to dismiss and motion for summary judgment to be interchangeable and each should be treated under its proper form.

The injustice of granting a summary judgment would necessarily violate the concepts of justice put forth by the Courts throughout their history. It has from time immemorial been the boast of the law, that the law will not suffer a wrong without a remedy, and where the procedure at law is not adapted to give relief, in the particular situation, equity will assume jurisdiction to grant relief promptly. In Funk v. United States, 290 U.S. 371, 54 S. Ct. 212, at page 216, our Supreme Court stated that the flexibility and capacity for growth and adaption is the peculiar boast

and excellence of the common law, and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice; we are not to assume that the source of its supply has been exhausted, on the contrary, we should expect that new and various experiences of our own situation and system will mold and shape it into a new and not less useful form.

Since appellant has been denied a remedy under the Compensation laws and since consortium is a property right which the Constitution protects, it would appear that the only way to keep our concepts of justice alive is to inject vitality into them by reversing the summary judgment rendered below and remand this action back to the lower Court for a trial on its merits.

ARGUMENT

I

THE SCOPE OF REMEDY PROVIDED UNDER THE RULE FOR SUMMARY JUDGMENT WAS NEVER INTENDED TO THROW UPON THE COURT THE BURDEN OF DETERMINING A CASE INVOLVING A DELICATE QUESTION OF LAW AND COMPLICATED AND CONTROVERTED FACTS RAISED BY THE PLEADINGS OF A CASE WITHOUT AN ADEQUATE AND PROPER HEARING.

This case was heard and disposed of below on a motion for summary judgment filed by the defendant who had previously been denied a motion to dismiss the action on the same grounds set forth in the motion for summary judgment.

The appellant's pleadings alleged that she was the wife of Donald Nathaniel Cooper at the time of his death but that she was denied compensation under the Longshoremen's and Harbor Workers Compensation Act (U.S. Code Title 33 Sections 901 et seq) as made applicable to the District of Columbia (D.C. Code 1961 Title 36 Sections 501 et seq). The reason she was denied compensation was because her claim was rejected on the ground that she was not the legal widow of the decedent, Donald

Nathaniel Cooper, because his former marriage to his first wife had not been legally dissolved at the time the appellant entered into a marriage contract with the decedent.

Her complaint further alleges that, prior to his death Donald Cooper complained to the appellee of dangerous working conditions; that the appellee failed to remedy the complaints and directed Donald Cooper to continue his employment of loading a railroad freight car with heavy iron and steel scrap metal. That on or about July 13, 1961, Donald Cooper was loading the scrap metal into a railroad freight car as directed using a crane provided by the defendant which was resting on a muddy, unstable and unsafe foundation upon the premises furnished by the defendant. That because of the defendant's negligence the crane toppled over and fell upon a collection of propane oxygen tanks which caused a raging fire, which engulfed the decedent causing his death. That because of this negligence of the appellee the appellant has been deprived of the consortium due her.

The appellee in his answer denied that appellant is the wife of the deceased, Donald N. Cooper; denied that the decedent, Donald Cooper, was married to appellant at the time of his death; denied that prior to his death the decedent complained to the appellee of dangerous working conditions under which he was directed to work; denied that he was, on July 13, 1961 loading scrap metal into a railroad freight car using a crane provided by defendant which was alleged to have been resting on a muddy, unstable and unsafe foundation on premises furnished by the appellee; denied that appellee was negligent; denied appellant was the widow of decedent and denies she was entitled to consortium with Donald N. Cooper, deceased. Appellee then set forth defenses of contributory negligence, assumption of risk, and that the appellee had secured compensation coverage under the District of Columbia Compensation Law, and that this law was the exclusive remedy.

The issue of the Compensation Statute had previously been determined by one judge of the United States District Court for the District of Columbia in a motion to dismiss filed by the appellee.

Nevertheless appellee after denial filed his answer then filed a motion for summary judgment before another judge of the Court who granted the motion.

We submit that the granting of the motion for summary judgment by the second judge after the identical issues had been denied by another judge in a motion to dismiss was error.

It has long been the rule on a motion to dismiss or on a motion for summary judgment that a plaintiff's material allegations and contentions of fact must be accepted as true, and that he must be given the benefit of the most favorable inferences which reasonably can be drawn therefrom. Jeffery v. Whitworth College, 128 F. Supp. 219.

This Court has long said that the rule authorizing summary judgment should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them. United Meat Company v. R. F. C., 85 U.S. App. D.C. 9; 174 F.2d 528.

A mere glance at the pleadings herein disclose that the allegations of the complaint and the answer thereto clearly raise several genuine issues of material facts, in that the appellee denies that the appellant was the widow or wife of the decedent Donald N. Cooper at the time of his death; denied that he had complained of dangerous working conditions prior to his death; denied that he was married to the appellee at the time of his death; denied that they had furnished him an unsafe place to work and denied all issues of negligence. All of these denials have raised genuine issues of material facts which should only be determined by a full hearing on the merits.

This Court has long held that a general denial of an allegation of fact is sufficient of itself to raise an issue of fact which will prevent the entry of summary judgment. See Garrett Biblical Institute v. American University, 82 App. D.C. 265; 163 F.2d 265, and again in Hunter v. Mitchell, 86 U.S. App. D.C. 121; 180 F.2d 763-64. Wherein the Court stated that summary judgment was improper where there was a genuine issue of fact

raised. Moreover, this Court went much farther in that case stating that upon a motion for summary judgment it is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Further, that all doubts as to the existence of a material fact must be resolved against the moving party. To the same effect Vale v. Bournett, 191 F.2d 334; United Meat Company v. R.F.C., 85 U.S. App. D.C. 9, 174 F.2d 528; Miller v. Miller, 74 U.S. App. D.C. 216, 122 F.2d 209.

It would seem that under the facts in this case as raised by the pleadings the granting of appellee's motion for summary judgment was improper and should be reversed and the case remanded for a trial on the merits.

II

A SUCCESSOR JUDGE IS WITHOUT POWER TO GRANT SUMMARY JUDGMENT WHICH HAS THE EFFECT OF VACATING AND SETTING ASIDE AN ORDER OF A PREDECESSOR ENTERED DURING THE SAME TERM OF COURT

Appellant submits that not only is it error for a judge to grant a motion for summary judgment when the pleadings show genuine issues of material fact at issue but it is a further error for a second judge of a United States District Court to create a conflict within the jurisdiction by granting summary judgment which overrules, vacates and sets aside the ruling of a first judge upon the same set of facts.

It would appear that a United States District Court must maintain balance and consistency of action and decision in all of its judicial acts and actions. Thus it would seem to be error for a court to allow a successor judge within the same jurisdiction to perform any judicial act which would overrule, vacate or set aside an order of his predecessor within the same jurisdiction. To allow such action would be to abrogate the power of, not only of one judge by another judge, but also of the judicial power of the Court itself.

A Court consists of persons officially assembled at a time and place appointed by law for the administration of justice. The proper persons would seem to be the clerk, marshall, and judge of the circuit who assemble at a time appointed by law for holding said Court. Its purpose is to administer justice in an orderly and consistent manner.

It has been held in State v. Simmons, 57 N.E. 2d 587-590, that throughout all the Constitutional provisions runs the controlling idea that a Court cannot exist without a judge. But that judge is not the Court; although, frequently the words are used interchangeable. A time when, a place where, and the persons by whom judicial functions are to be exercised, are essential to complete the idea of a Court.

The judge of a Court while presiding over the Court, is by common courtesy called the Court. It follows from these well recognized principles that the presiding judge of a District Court is not the District Court, and that his acts to become that of the Court must have been done within his jurisdiction. When one District Judge assumes jurisdiction in a particular judicial matter, his acts within his jurisdiction become those of the Court, and it would appear that another judge in the same jurisdiction would have no jurisdiction to interfere with his discretion or decisions upon a matter properly within his judicial power. Each judge can no doubt perform valid judicial acts on the same day at the same time and they would be the acts of the same Court, but that does not mean that one judge should interfere with the decisions of another judge on a matter the effect of which tends to create uncertainty and conflict within that Court by granting a summary judgment on matters which has the effect of overruling, vacating, or annuling a judgment or order of his predecessor. To allow such actions seriously impairs the power of an individual judge by allowing another judge to abrogate his authority to rule on a discretionary motion to dismiss.

In Lawyers Co-op Publishing Co. v. Williams, (1942) 149 Fla. 390, 5 So.2d 871, where a trial judge rendered a verdict for plaintiff and denied the defendant's motion for a new trial as well as a subsequent petition for

rehearing on the motion, it was held error for a subsequent judge to vacate the judgment of the former. The Court noted the rule holding that a Court's order, however conclusive, is under that Court's control during the term at which it is rendered, but stated that it would not follow for this recognition of the Court's inherent power over its own actions that a successor judge could reverse or modify his predecessor's orders or discretionary rulings where the facts remained unchanged. To the same general effect, State Exrel Harp v. Nanderburgh Circuit Court, (Ind. 1949), 85 N.E. 2d 254.

Another case, St. John v. Archer, (1941 Tex. Cin. App.), 147 S.W.2d 519, where a motion for a new trial was granted by the trial judge and a special judge elected to office vacated the order - it was held that the special judge was not empowered to vacate the order of the trial judge, since his action was in effect a review of the action of his predecessor, and constituted the exercise of appellate rather than trial jurisdiction the Court then stated:

> "It is clear that a judge who enters an order or judgment ordinarily retains jurisdiction over such order of judgment until the end of the term, or until such judgment passes beyond his control by reason of some other provision of the statute and he may change, amend or set aside such an order or judgment without hearing further evidence, and even upon his own motion. But his successor in office, or a special judge selected to act in his stead, does not have such orders or judgments rendered by such prior judge."

It would seem to be in the interest of uniformity and certainty in to conform to the principle that if the first judge had jurisdiction to render such order or judgment, that such succeeding or special judge would not have jurisdiction to change, amend or set aside such order involving the same set of facts as was done in this case. See also Henderson v. Soash, 157 S.W. 2d 161-163.

Moreover it would appear that the doctrine of "Res Judicata" and/or "Collateral Estoppel" would have applied to the successor judge in this case and prevented an entry of summary judgment on behalf of the appellee.

The distinction between the doctrine of "res judicata" and "collateral estoppel" has been stated by Justice Field in Cromwell v. Sac County, 94 U.S. 351, 24 L.ed 195, where he said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example; a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.
>
> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is this judgment conclusive in another action."

It appears that under modern terminology, where the second motion before the successor judge is brought on the same theory involving the same facts the bar to the second decision is called "res judicata"; whereas, when the second motion is brought on a different theory but upon the same set of facts the bar to the second decision against relitigating the same issues which had been determined in the earlier motion is called "collateral estoppel". In either case the result as applied to the instant case should have prevented granting summary judgment.

As to the latter doctrine we quote the Court of Appeals in the Tenth Circuit in the case of Swift v. Jackson, 37 F.2d 237:

> "It is not material to this estoppel that the judgment which works it may have been erroneous; that the court may have been mistaken in the facts, may have misconceived the law, or may have disregarded the public policy of the nation when it rendered it. It is sufficient that it had jurisdiction of the subject matter of the action and of the parties to it, and in this state of the case the established rule of law is that its judgment upon the merits in an action between the same parties, or between those in privity with them, upon the same claim or demand, is conclusive, whether right or wrong, not only as to every matter offered, but as to every admissible matter which might have been offered, to sustain or defeat the claim presented."

As this decision indicates, mere changing the form of a motion from dismissal to summary judgment does not prevent the application of either of the two doctrines in this case.

III

COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THE FACTS SHOWED THAT APPELLANT'S INJURY WAS FOUND TO BE OUTSIDE THE PURVIEW OF THE LONGSHOREMEN'S AND HARBOR WORKERS COMPENSATION ACT (33 U.S.C. SECTIONS 901 ET SEQ) AS MADE APPLICABLE TO THE DISTRICT OF COLUMBIA (TITLE 36 D.C. CODE SECTIONS 501 ET SEQ) AND WAS THEREFORE, NOT COMPENSABLE UNDER THE SAID ACT.

The loss of consortium suffered by appellant was not compensable under the Longshoremen's and Harbor Workers Compensation Act as

made applicable in the District of Columbia; therefore, the Court was in error in holding that her Common Law remedy was excluded by Section 905 of the aforesaid Act and the granting of appellee's motion for summary judgment on that ground cannot be sustained.

The damages which appellant has been and is continuing to suffer because of the omissions and negligence of the appellee were not compensable because the Compensation Commission determined that she was not the wife of the decedent Donald Nathaniel Cooper, apparently because Maryland does not recognize Common Law marriages and since the decedent's marriage to his first wife had not been finally terminated at the time of his marriage to appellant he was not free to enter a contractual marriage relationship with appellant so their purported marriage was void.

Section 902 of Title 33 United States Code paragraph 16 defines the term widow as including only the decedent's wife living with or dependent for support upon her husband at the time of his death. While the term widow would seem to be sufficient to include a common law wife in the case of Keyway Stevedoring Company v. Clark,(DC med), 43 F.2d 983, it was held that where such wife had no standing under the law of the state she was not entitled to compensation. This decision may have accounted for the Workmen's Compensation Commission's denial of compensation benefits under the Compensation Act to this appellant. Moreover the Longshoremen's Compensation Act as applied to the District of Columbia under 36 - 502 of the D.C. Code expressly excepts an employee of a common carrier by railroad. As the complaint alleges the decedent Donald N. Cooper at the time of the fatal injury was loading scrap metal on a railroad car. Title 44 of the D.C. Code Section 401 expressly imposes liability on common carriers within the District of Columbia for all damages caused by negligence of its officers, agents and employees or for negligence caused by defects in its cars, engines, appliances, machinery, track, roadbed, ways or works. All of which not only raise questions of fact but also questions of law as to the application of the compensation law in this case.

It would seem that the exclusiveness of the remedy provided for by Section 905 as it relates to your appellant could only logically be directed to the derivative advantages inuring to the personal representatives of the injured employee and can in no manner affect personal injury to a third person's property and that even though the necessary agent of appellant's injury is an employee within the scope of the act. Appellant who was found to be outside the jurisdiction of the Workmen's Compensation Act has a common law remedy against the appellee for negligent injury and loss to her consortium with the deceased Donald N. Cooper with whom she cohabitated as husband and wife from April 21, 1956 until his death July 18, 1961 and with whom she cohabitated as husband and wife in the District of Columbia since 1959.

This Court recognizes this consortium as a property right. Hitaffer v. Argonne Company, 87 U.S. App. D.C. 57, 183 F.2d 811; Cert. denied 340 U.S. 852, 71 S. Ct. 80, 95 L.Ed. 624. Damages for the loss of consortium for which she seeks redress is a personal right, and any unlawful interference with it results in a cause of action independent of the cause of action which inured to the employee himself. Clearly then, since appellant was denied redress for the pecuniary loss, i.e., loss of income which resulted to her because of appellee's negligent injury to her husband surely she is entitled to her cause of action solely on loss of consortium to her which losses were negligently caused by the appellee and she is not precluded from obtaining relief by Section 905 of the Longshoremen's Compensation Act as applied to the District of Columbia. It would be illogical to deny her on one hand a remedy for negligent injury to her right to consortium while on the other hand providing a remedy as the courts do in actions for alienation of affections.

It has from time memorial, been the boast of the law; that the law will not suffer a wrong without a remedy, and where the procedure at law is not adapted to give relief in a particular situation, equity will assume jurisdiction to grant relief promptly. In the case of Funk v. United States, 290 U.S. 371, 54 S. Ct. 212, at page 216 the Supreme Court stated that the

flexibility and capacity for growth and adoption is the peculiar boast and excellence of the common law, and as it was the character principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms. We submit that the proper way to keep these concepts alive is to give them new life by reversing the summary judgment granted in this case.

Although the right to a common law action for consortium with an injured employee is one step removed from that of the employee, nevertheless a brief analysis of those cases wherein the injury to the employee was held not to be compensable under the Compensation Act and therefore not to deny the employee of his common law cause of action may be appropriately cited.

To begin with, this Court in the case of Marlin v. Cordillo, 68 App. D.C. 201, 95 F.2d 112, in construing the Longshoremen's and Harbor Workers Compensation Act said in part on page 204:

> ". . . for it is a well settled rule of construction that the letter of a statute will not be followed when it leads to an absurd conclusion or a meaningless result."

Generally, where Workmen's Compensation Acts are applicable they afford the exclusive remedy for the injury. This is held to be part of the "quid pro quo" in which sacrifices and gains of employees and employers are put in balance. The employer, in return for his assumption of a new liability without fault, is relieved of the prospect of large damage verdicts. The employee in exchange for its negligence actions was to be provided with a sure remedy that was both expeditious and independent of proof of fault.

This exchange necessarily implies that an employee or his representative shall have a remedy. If this is the justification for the rule it follows that the employer should be relieved only when compensation

liability has been provided in its place. It would be unfair to pull this appellant within the principle of mutual sacrifice when her part of the principle is to be all sacrifice and no corresponding gain. Her right to consortium, deemed in law to be a property right should not be taken away from her unless something of value is put in its place. This is a conclusion necessary to square the law with the United States Constitution which provides for equal protection under law and that no property right of a person shall be taken without just compensation.

In Zajkowski v. American Steel Wire Co., 258 Fed. 9, it was held that the only causes of action denied by the Workmen's Compensation Act were those injuries wherein damage could be paid out of insurance funds. The Court said in part on page 15:

> "It cannot be that the Compensation Act was designed to take away any right of action as respects a Claim, like the one here involved, which the act does not purport to include or to allow to be paid out of insurance fund."

In Jellico Coal Company v. Atkins, 197 Ky. 684, 247 S.W. 972, it was held that diseases which an employee contracted in the course of his employment occasioned by the negligence of the employer are not compensable under the act and therefore, a cause of action or common law could be maintained. On page 974 the Court said:

> "In other words, by this act (Workmen's Compensation Act) the subtle refinements and distinctions of the common law are swept aside, and a remedy is found for all the ills incidental to industrial casualties. We are not dissenting from this, nor are we assenting to it, but we venture to suggest that, if such was the human purpose of the legislature, it should hardly have been intended as a part of the same act to deny all remedy and all recovery to the employees of this commonwealth who contract diseases through the negligence of their employers."

In Donnelly v. Minneapolis Mafg. Co., 161 Minn. 240, 201 N.W. 305, page 306.

> "As already indicated the Compensation Law, so far as it covers the field of rights and remedies as between employer

> and employee, is exclusive. The statute is a substitute for the common law on the subject which it covers and so far as it goes. But it does not affect the rights and wrongs not within its purview or which by implication or express negation are excluded."

In another case, Boyer v. Crescent Paper Box Factory, 143 La. 368, 78 So. 596, where the Compensation Act provided that the rights and remedies therein to the employees on account of personal injuries for which they were entitled to compensation under the Act should be exclusive of all the employee's other rights and remedies on account of such injuries, the Court held that since the Act provided no compensation in the case of disfigurement by reason of employee's loss of her scalp when her hair was caught in a belt that she was entitled to maintain a common law action for damages.

This Court is thoroughly familiar with the fact that respiratory diseases suffered by employees have been largely excluded by Compensation Acts and are thus the subject matter of common law causes of action. In Smith v. International High Speed Steel Co., 98 N.J.L. 574, 120 A. 188, the Court held that an injury from breathing particles of metallic and mineral substances which resulted in death was not an accidental injury within the purview of the Compensation Act and thus did not deny a remedy at common law to the suffering employee. In another case, Barrencotto v. Cocker Saw Co., 266 N.Y. 139, 194 N.E. 61, the Court went on to say that under no construction of the Compensation Statute should this preclude a common law remedy for injury from silicosis. To the same effect, Trout v. Wickwire Spender Steel Co., 195 N.Y.S. 528. Scherens v. E. W. Edwards & Son, 133 Misc. 616, 232 N.Y.S. 557, it was held that when an employee is entitled to compensation as provided in the Workmen's Compensation Law he is deprived of his right to a common law action for damages, but that the statute does not deprive an injured employee who has not a remedy under it from maintaining a action for damages. A very good analysis of the law was set forth in the case of Jones v. Reinhart & Denis Co., 113 W.Va. 414, 168 S.E. 482, where it was held that under a Workmen's

Compensation Act providing that an employer should not be liable to respond in damages at common law for injury or death of any employee however occurring, but that they were not exempt from liability for non-compensable diseases caused by negligence of the employer. The Court then reviewed the briefs of counsel and commented that in many of the states, the Workmen's Compensation Acts exempted employers from liability for damages only in cases in which employees were entitled to compensation under the Acts. That in 40 of the 44 states mentioned the exemption of the employers was thus limited; that the only states not limiting the exemption were North Dakota, Ohio, Washington and West Virginia. The Court went on to say that in most of the states employers were not exempt from liability for damages which were non-compensable, in those cases, the employers were merely placed on the same basis as employers elsewhere and that it was difficult to perceive a satisfactory and reasonable basis for exemption of employers from liability for diseases caused by their negligence when the compensation statutes did not cover the disease and made in non-compensable under the statute. Thus it seems that most all jurisdictions recognize the rule. See: General Printing Corp. v. Umbach, 100 Ind. App. 285, 195 N.E. 281; Kress v. City of Newark, 8 N.J. 562, 86 A. 2d 185; Wojoik v. Aluminum Company of America, 183 N.Y.S. 2d 351; Baking Co., (Continental) v. Hines, 334 S.W. 2d 140; Davis Drilling Co., 3 Cal. Rep. 681; Dalton Founderies Inc. v. Jefferies, 114 Ind. App. 271, 51 N.E. 2d 13; Dyre v. Pacific Coast Forge Co., 151 Wash. 430, 276 Pac. 89; Donnelly v. Minn. Mfg. Co., 161 Minn. 240, 201 N.Y. 305; Trout v. Wickwire Spencer Steel Co., 195 N.Y.S. 528; Schwartz v. Queensboro Fair Products, 191 Misc. 778, 78 N.Y.S. 2d 863; Pershing Quicksilver Co. v. Theirs, 62 Nev. 382, 152 P. 2d 432; Triff v. Nat. Bronze Foundry, 135 Ohio 191, 20 N.E. 2d 232; Peerless Woolen Mills v. Pharr, 74 Ga. App. 459, 40 S.E. 2d 106; Woodward Iron Co. v. Minyard, 170 F.2d 508; Kane v. Fed. Match Co., 5 F. Supp. 507; Covington v. Berkley Granite Corp., 182 Ga. 235, 184 S.E. 871; Clark v. M.W. Leahy Co., 300 Mass. 565, 16 N.E. 2d 57; Oklahoma Steel Casting Co. v. Banks, 181 Okla. 503, 74 P. 2d 1168; Mapes

v. Massey Harris Co., 19 F. Supp. 667; Boal v. Electric Storage Battery, 98 F. 2d 815; Gentry v. Swan Chemical Co., 234 Ala. 313, 174 So. 530; Georgia v. Berkley Granite, 184 N.E. 871; McGhee v. Mesphan, 279 Ill. App. 115; Clark v. Banner Grain Company, 195 Minn. 44, 261 N.W. 596; Rosenfield v. Mathews, 201 Minn. 113; Mutolo v. Utica Gen. Jobbing Foundry, 161 Misc. 327, 292 N.Y.S. 14; Griesbach v. B. T. Babbott, 254 App. Div. 601, 2 N.Y.S. 2d 848; Dixon v. Gas Pump & Burner Mfg., 183 Okla. 249, 80 P. 2d 678; Billo v. Allegheny Steel Co., 328 Pa. 97, 195 at 110.

In all of these cases as the Compensation Statutes involved in this case which has provided no remedy for this appellant the party was allowed to bring an action in tort. The Compensation Act in this case surely cannot be construed to mean that it excludes appellant from recovery for personal injury which was outside the scope of the master and servant relationship and at the same time deny her any other remedy available to her.

Plaintiff has a common law remedy for negligent injury to her consortium and it is appropriate for this Court to sustain her damages for the loss of the same. In view of the liberal statutes of emancipation of married women, 30-208 D.C. Code, there can be no valid reason why she should not be allowed to bring her action for loss of consortium. No valid reason now exists for denying appellant access to this Court any other holding would be a denial of her right to due process of law and equal protection of the law guaranteed by the Constitution of the United States, Chicago B&Q Rwy Co. v. City of Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 978.

CONCLUSION

Appellant, therefore, respectfully requests that this Court protect her rights by reversing the summary judgment rendered herein and remand the case back to the United States District Court for the District of Columbia with instructions to hold a hearing on the merits.

Respectfully submitted,

JOHN J. SPRIGGS, JR.
614 Indiana Avenue, N.W.
Washington 4, D. C.
Attorney for Appellant

INDEX

JOINT APPENDIX

[Filed January 3, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SYLVIA O. COOPER
2204 Lawrence Street, N. W.
Washington, D. C.

Plaintiff,

VS.

JACOB C. LISH
1025 Vermont Ave., N.W. (Agent for)

SUPER SALVAGE COMPANY
a corporation
1711 - 1st Street, S.W.
Washington, D. C.

Defendant.

CIVIL ACTION NO. 14-62

COMPLAINT FOR NEGLIGENCE & PERSONAL INJURIES RESULTING IN DEATH

1. The plaintiff is the widow of Donald N. Cooper, deceased; and at all times mentioned herein was the wife of Donald N. Cooper.

2. The defendant is a corporation doing business in the District of Columbia and at all times mentioned herein was the employer of Donald N. Cooper, age 33.

3. The Workmen's Compensation Act does not apply to this case because the plaintiff's claim was rejected by the defendant and the Workmen's Compensation Commission.

4. Plaintiff's husband, Donald N. Cooper, deceased, for many years prior to and at all times mentioned herein was employed by the defendant as a crane operator earning approximately $130.00 per week, was happily married to the plaintiff, completely supported her and on or about July 13, 1961 he was so employed by the defendant, was acting within the scope of his employment under the direction of the defendant.

He had, on previous occasions complained to the defendant of the dangerous working conditions under which he was directed to work.

5. The defendant failed to remedy the complaints and on or about July 13, 1961 directed the said Donald N. Cooper to continue his employment and to load a certain railroad freight car with heavy iron and steel scrap metals from a pile in the defendant's yards.

6. On or about July 13, 1961 the said Donald N. Cooper was loading said iron and steel scrap metals into a railroad freight car as directed by the defendant using a crane provided by the defendant resting upon a muddy, unstable and unsafe foundation upon the premises furnished by the defendant. While so working Donald N. Cooper sustained fatal injuries from which he died as a direct result of the negligence of the defendant in that the crane overbalanced and toppled over, the 50 foot boom fell upon a collection of propane and oxygen tanks negligently placed nearby by the defendant, thereby causing a raging fire to break out which engulfed the steel enclosed cab on the crane in which Donald N. Cooper worked and from which he jumped but only to fall into a blazing inferno from which he was taken by his fellow employees and moved to the D.C. General Hospital where it was discovered that he had sustained burns over 75% of his body from which he died on or about July 18, 1961.

7. The said Donald N. Cooper died as a direct result of the negligence of the defendant leaving the plaintiff, a widow with four children to raise without a father. The defendant has therefore, deprived the plaintiff of the consortium of her husband, she has been deprived of his support in the sum of $133.00 per week for the remainder of her life. In addition she has suffered and will continue to suffer great mental pain, shock and anxiety for the remainder of her life; all to her damage in the sum of $250,000.

WHEREFORE, Plaintiff demands judgment from the defendant in

the sum of $250,000; together with such other and further relief as to this Court may seem just and proper.

/s/ John J. Spriggs, Jr.
614 Indiana Avenue, N. W.
Washington 4, D. C.
Attorney for Plaintiff

Plaintiff demands a jury trial in the above entitled cause.

/s/ John J. Spriggs, Jr.

[Filed February 20, 1962]

MOTION TO DISMISS

Comes now the defendant, Super Salvage Company, a corporation and moves this court to dismiss the complaint filed herein by the plaintiff and for reasons therefore respectfully refers the court to the Memorandum of Points and Authorities attached hereto and made a part thereof and to the records herein.

/s/ John F. Cooney
Attorney for Defendant,
Super Salvage Company
1000 Vermont Avenue, N. W.
Washington 5, D. C.

[Certificate of Service]

[Filed February 20, 1962]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

FACTS:

1. The accident that allegedly is the basis of plaintiff's action herein occurred in the District of Columbia on or about July 13, 1961.

2. The plaintiff alleges in her complaint that the Workmen's Compensation Act does not apply to this case because the plaintiff's claim was rejected by the defendant and the Workmen's Compensation Commission and she further alleges that she is the widow of one

Donald N. Cooper, deceased, and all times mentioned herein was the wife of Donald N. Cooper.

3. Plaintiff further alleges that her alleged husband Donald N. Cooper, deceased, for many years prior to and at all times mentioned herein was employed by the defendant and was so employed within the scope of his employment on or about July 13, 1961.

ARGUMENT:

1. The plaintiff's compensation claim was rejected by the Workmen's Compensation Commission on the ground that the plaintiff in this action was not the wife of the deceased, Donald N. Cooper, although there was in full force and effect at the time of the alleged accident of July 13, 1961, Workmen's Compensation policy making the employer subject to the provisions to provide compensation for disability or death resulting from injury to employees in the District of Columbia; that the liability of the employer for compensation under the said Act was insured by the Hartford Accident & Indemnity Company.

2. Section 5 of the Workmen's Compensation Act for the District of Columbia provides, "The liability of an employer shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from employer at law or admiralty on account of such injury or death except that if an employer fails to secure payment of compensation as required by this Act, an injured employee or his legal representative in case death results from the injury may elect to claim compensation under this Act, or to maintain his action at law for damages on account of such injury or death."

Conclusion:

The law in this jurisdiction on the point involved is abundantly clear. The employer carried a Workmen's Compensation policy at the time of the death of the employee, the employee was working at the time within the scope of his employment and under Section 5 of the

Workmen's Compensation law the remedy is exclusive providing the employer was covered by Workmen's Compensation at time of the injury or death.

/s/ John F. Cooney
Attorney for Defendant
1000 Vermont Avenue, N. W.
Washington 5, D. C.

AFFIDAVIT

Milton C. Kershner, being duly sworn, deposes and says that he is and was on July 13, 1961, the manager of the Compensation Claim Department for the Hartford Accident and Indemnity Company located at 1000 Vermont Avenue, N.W., Washington, D. C., that on that date the defendant, Super Salvage Company did have in full force and effect a Workmen's Compensation policy with the Hartford Accident and Indemnity Company by a Policy No. and as a result of an accident occurring on or about July 13, 1961, resulting in the death of one Donald N. Cooper, an employee of the Super Salvage Company, the employer, Super Salvage Company did file notice with the compensation department and the Hartford Accident and Indemnity Company and a hearing was held on the case.

/s/ Milton C. Kershner

[JURAT dated February 19, 1962]

[Filed March 5, 1962]

OPPOSITION TO MOTION TO DISMISS

Comes now the plaintiff and opposes the motion to dismiss the complaint filed herein for reasons more fully set forth in complaints, argument, and points and authorities following herein.

STATEMENT OF FACTS

Plaintiff, Sylvia Cooper, on April 21, 1956, entered into a marriage ceremony with Donald N. Cooper in the State of Maryland. She continuously cohabitated with him thereafter until the day of his death, July 18, 1961. She had borne him four children, and they moved to the District of Columbia during 1959 and cohabitated together in the District of Columbia until the day of his death.

Donald N. Cooper was employed by the Super Salvage Company, Inc., and earned an excess of $105.00 per week. They were buying their own home in the District of Columbia. Donald Cooper had previously been married and in that marriage had borne two children. This marriage ended in divorce finally in 1957, although Donald Cooper had received notice of a final decree having been entered during 1954.

Donald N. Cooper was killed through the negligence of the Super Salvage Company during the course of his employment. After his death, the Super Salvage Company rejected the claim of the plaintiff, Sylvia Cooper, to compensation under the Workmen's Compensation under the Workmen's Compensation statute.

The Workmen's Compensation Commission rejected her right to Workmens compensation presumably for the purpose of compelling two families to accept compensation ordinarily allowed for one family. The Commission decided that she was not the wife of Donald N. Cooper at the time of his death, July 18, 1961. The Workmen's Compensation Commission, at the same time, incorrectly and without evidence decided that Vepipa J. Cooper Killiebrew married Donald N. Cooper, June 26, 1956, and borne him two children. She divorced Donald Cooper and a final decree was entered June 28, 1957, in the Circuit Court of Prince Georges County at Upper Marlboro, Maryland. In this manner the plaintiff was deprived of the compensation which should have been due under the Compensation Act. She therefore comes in this action outside the jurisdiction of the Workmens Compensation Statute, as she has alleged in her complaint.

Defendant's negligence causing the death of Donald N. Cooper occurred in the District of Columbia July 13, 1961, at the time plaintiff was cohabitating with the deceased and who had a right to consortium with him. Since she was held to be outside the Workmens Compensation Statute she instituted this action for negligence in this Court.

Defendant, in his motion to dismiss, alleges that plaintiff's compensation claim was rejected by the Workmens Compensation Commission on the ground that the plaintiff was not the wife of the deceased, Donald N. Cooper; That there was a Workmen's Compensation policy in force and effect at the time of his death, and, therefore, under Section 5 of the Workmen's Compensation Statute she cannot maintain this action of law because the employer was covered by Workmens Compensation Insurance at the time of the injury or death. This concept is contrary to law, and even the clear import of the Workmens Statute which expressly provides for an action of law for negligence in the event the employer fails to secure compensation under the Act. Section 904 of the Act states as follows: "Every employer shall be liable for and secure the payment to his employees of the Workmens Compensation, payable under Sections 7, 8, and 9. Section 905 expressly provides that if an employer fails to secure payment of compensation as required by the chapter, an injured employee, or his legal representative, in case of death results from the injury, may elect to claim compensation due under this chapter, or to maintain an action at law for damages on the account of such injury or death.

Title 16, Section 1601 of the D.C. Code, the wrongful death Statute, allows plaintiff to institute the instant proceedings.

It is to be noted that the wording of the Workmens Compensation Statute above, clearly reveals a false premise upon which defendant has based his motion to dismiss. It clearly shows that the employer's mere carrying a Workmens Compensation Insurance Policy at the time of death, does not clothe him with the exclusive provisions of the Statute, but he must, in addition, do more; that is, he must secure

payment of compensation to the injured employee or his survivors. If he does not, then the survivor may make an election to demand Workmens Compensation or institute legal proceedings in an action for negligence.

In the case of Muir vs Kessinger 35 F. Supp page 116 wherein it is held that the Washington Workmens Compensation Law is not opposed to the common law theory of recompense for injury, and a common law action may be maintained and is remedy in force in all cases not covered by the Act. Mrs. Cooper, as has been shown before, was not covered by the Workmens Compensation Act.

The common sense reason for the decision was stated on page 118 as follows: "The right to sue and defend in the Courts is the alternative of force. In an organized society it is a right conservative of all other rights and lies at the foundation of orderly Government." The case cited, Chambers vs Baltimore and Ohio Railroad Co., 207 U.S. 142 p. 148, 28 S. CT. 34 & 35.

It appears to be the almost universal rule that the exclusive remedy of one not covered by the Workmens Compensation Statute is an action at law to recover damages for negligence. The Municipal Court of Appeals for the District of Columbia so stated in Garcia vs Deleon 59 A. 2d 637 to the same effect Hardware Mutual Casualty Company vs Ozman, 14 NW 2d 351, 217 Minn. 280. Larson vs Todds Shipyards 16 F Supp 967. Lease vs Upper Potomac River Commission 20 A 2d 498, 179, Md. 543. Utah Idaho Sugar Co., vs Temmey 58 NW 2d 486, 68 SD 623. Conway v Park 31 NE 2d 79. Riddle Eagles Estate 85 SO 2d 926, and Peterson V Sorensen 65 P 2d 12.

Moreover, the Statute provides that where a claim is rejected and if an action is filed then the employer is precluded from setting up the assumption of risk or negligence of a fellow servant as a defense to that action.

In this case the defendant did not secure compensation for the plaintiff. Indeed, he rejected her claim for compensation on the ground

that she was not his wife. Moreover, Defendant did not file an affidavit in support of his motion to show that he secured compensation to his plaintiff. If a defendant alleges that fact, then he has the burden to prove it, at least, by submitting an affidavit.

The Court of Appeals in this jurisdiction long ago construed this chapter to give a consortium right to women in the District of Columbia. The Court, in Hitaffer V Argone 87 US App DC 57, 183 F 1d 811 Sert., denied 340 US 852, 95 L. ed. 624, stated that Section 905 of the Workmens Compensation Statute was designed to make employers' liability exclusive of any other liability to injured employee, or anyone suing in employees right, but where a third person is suing in his or her own right, this Section did not preclude third persons causes of action.

Plaintiff, in this action, has shown that she is outside the jurisdiction of Workmens Compensation since she was precluded upon the theory that she was not the wife, and therefore has shown indisputably that she was entitled to consortium with the decedent.

In this action, the plaintiff's so-called rights under the Workmens Compensation Statute were repudiated by the defendant, and since she was not the wife of the decedent, the Workmens Compensation Statute did not apply as to her. Moreover, in Garcia V DeLeon 59 A 2d 637, The Municipal Court of Appeals for the District of Columbia held in substance, that regardless of whether employer secures payment of compensation, either by taking out insurance or providing for paying such compensation directly, employer remains liable, and employee is entitled to institute proceedings for an award before the Deputy Commissioner, and then before the U. S. Court for collection of the award.

The injustice of granting the motion to dismiss herein would violate the precepts put forth by the Courts throughout the ages. It has from time immemorial been the boast of the law, that the law will not suffer a wrong without a remedy, and where the procedure at law is not adapted to give relief, in the particular situation, equity will assure jurisdiction to grant relief promptly.

In Funk vs U.S. 290 US 371 54 S. ct 212, page 216, it was held that the flexibility and capacity for growth and adaption is the peculiar boast and excellence of the common law, and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms. It would appear, therefore, that the only way to keep these concepts alive is to deny the motion to dismiss filed herein by the defendant.

Respectfully submitted,
/s/ John J. Spriggs, Jr.

[Certificate of Service]

[Filed March 26, 1962]

ORDER DENYING MOTION TO DISMISS COMPLAINT

Upon consideration of the Motion to dismiss the complaint filed herein by the defendant; together with the memorandum of points and authorities in support thereof; the opposition thereto filed herein by the plaintiff, and at the hearing the case being submitted on the briefs upon agreement of counsel, it is by this Court on this 26th day of March, 1962;

ORDERED, ADJUDGED AND DECREED; that the motion to dismiss the complaint be, and the same is hereby denied.

/s/ John J. Sirica
JUDGE

[Certificate of Mailing]

[Filed March 30, 1962]

ANSWER TO COMPLAINT

FIRST DEFENSE:

The complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE:

The defendants deny the allegations of Paragraph 1. The Defendants admit Paragraph 2. Defendants deny that the Workmen's Compensation Act does not apply to this case as stated in Paragraph 3 but admit that the plaintiff's claim was rejected by the Workmen's Compensation Commission. Defendants admit that part of paragraph 4 concerning the employment by the defendant and at the time of the injury he was acting within the scope of his employment but denies that he was married to the plaintiff or that he had on previous occasions complained to the defendant of the dangerous working conditions under which he was directed to work. The defendants deny all of Paragraphs 5 and 6 with the exception of that part which relates to the fact that while so employed Mr. Cooper received injuries from which he died and specifically deny any and all acts of negligence as alleged. The defendants deny the negligence alleged in Paragraph 7, deny that the plaintiff was a widow of the deceased and as to the remaining allegations of Paragraph 7 the defendants state they do not have sufficient information to form a belief but demand strict proof thereof.

THIRD DEFENSE:

The defendants allege the defense of contributory negligence.

FOURTH DEFENSE:

Defendants allege the defense of assumption of risk.

FIFTH DEFENSE:

Defendants allege that at the time of the alleged injury, the deceased's employer had secured compensation coverage which was in full force and effect and that under the Workmen's Compensation Act for the District of Columbia, the liability of an employer shall be

exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, defendants, next-of-kin and anyone else entitled to recover damages from employer.

WHEREFORE, defendants ask that the complaint be dismissed with costs.

/s/ John F. Cooney
Attorney for Defendants

* * *

[Certificate of Service]

[Filed March 30, 1962]

NOTICE TO TAKE DEPOSITION
OF THE PLAINTIFF SYLVIA O. COOPER
BY ORAL EXAMINATION

TO:

John J. Spriggs, Jr., Esq.
614 Indiana Avenue, N. W.
Washington, D. C.

Please take notice that on Wednesday, April 4, 1962 at 10:00 A.M., at 1000 Vermont Avenue, N.W., Room 206, before Lucius B. Friedli, notary public in and for the District of Columbia, the defendant will take the deposition of the plaintiff, Sylvia O. Cooper, by oral examination for the purpose of discovery as evidence or both pursuant to Rule 30 of the Federal Rules of Civil Procedure.

/s/ John F. Cooney
Attorney for Defendants

* * *

[Certificate of Service]

DEPOSITION OF SYLVIA COOPER

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.

April 4, 1962

* * * * *

3 Thereupon

SYLVIA O. COOPER,

the plaintiff, called for examination by counsel for the defendants, having been duly sworn by the notary, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE DEFENDANTS

BY MR. COONEY:

Q. What is your name? A. Sylvia Odybelle Cooper.

Q. And where do you live, Mrs. Cooper? A. 2204 Lawrence Avenue, Northeast, Washington, D. C.

Q. And how long have you lived there? A. I lived there from June the 14th — I am not so sure of the date, in 1959, in June.

Q. Who is living there with you at the present time? A. My sister resides with me.

Q. And what is her name? A. Mrs. Anna O'Dell.

Q. Anybody else? A. Her children and my children, and that is all.

Q. Mrs. Cooper, are you married? A. I do not know from what Compensation says; they say —

4 Q. Well, is your husband living at the present time? A. No; he died July 18, 1961.

Q. What was his name? A. Donald Nathaniel Cooper.

Q. Well, how long were you married to him? A. Oh, according to that paper that I have, that marriage license that I have, April *** April 21, 1956.

Q. OK. Do you know where you were married? A. In Maryland.

5 Q. What place in Maryland? A. Out in Chapel Oaks; the Reverend Mr. Craig married us in the Baptist Church. It is all on the marriage certificate.

Q. Had you been married before that? A. Yes; I had.

Q. And to whom? A. Joseph Dockett.

6 Q. Now, when did you obtain the divorce? A. That was in 1956, I think. I don't have my divorce paper; I don't have any of my documents back.

Q. Do you know where the divorce was obtained? A. In Prince George County, Maryland.

Q. Would I be correct in saying you divorced Mr. Dockett on March 22, 1956? A. Yes, sir.

Q. From November of 1951, I believe, the time that you left your husband, Mr. Dockett, until the time you obtained the divorce in March
7 of 1956, who did you live with? A. My mother.

Q. Did you live with anybody else? A. No.

Q. Did you live with Mr. Donald Cooper? A. No.

Q. Did you ever live with Mr. Donald Cooper? A. After we had been married; I thought we were married.

Q. What do you mean, you thought you were married? Did you have a marriage ceremony? A. Why I had a marriage ceremony.

Q. And do you recall when that was? A. That was in April.

Q. Of what year? A. 1956.

Q. And where were you married to Mr. Cooper? A. Where was I married?

Q. Yes; where? A. Out in Chapel Oaks, Maryland.

Q. Then, until you married Mr. Cooper in April 1956, you had not been living with him prior to that time? A. No; I had not.

8 Q. After you married him in April 1956, did you go to live with him? A. Yes.

Q. And where did you live? A. Out in Fairmount Heights, Maryland, and —

Q. And who lived with you? A. He and my son.

Q. Any children? A. Why I have four children.

9 Q. Did you know that Mr. Cooper had been married before? A. Yes.

Q. And did you know whether or not he had been divorced from his first wife? A. According to the paper that he had I figured he was divorced and so did he.

Q. Now, look at that paper again (handing to witness)? A. Yes,
10 sir.

Q. That is a copy of a decree of absolute divorce, is it? A. This is the copy that he received.

Q. And when he showed it to you the dates were not filled in. Is that correct? A. As it is on this paper.

Q. After you married Mr. Cooper did you work anywhere?

A. I was working when I married.

Q. Where were you working? A. Out in Arlington, Virginia.

Q. What kind of work were you doing? A. Government work.

Q. For the District? A. For the Federal Government.

Q. The Federal Government? A. Yes.

Q. And how long did you continue to work there? A. Well, off-and-on for about nine years, I think.

Q. Were you working there at the time that your husband was injured? A. No; I had too many children and he was making enough to

11 support us and he said it was not necessary for me to work.

Q. Where was he employed? A. At the Super Salvage, in Maryland.

Q. On July 13, 1961, the date that Mr. Cooper was injured, where was he employed? A. At the Super Salvage.

Q. And did he die as a result of the injuries he received at Super Salvage? A. According to the death certificate.

Q. Well, that is what you have also claimed, Mrs. Cooper?

A. That is what I was told.

Q. Did there come a time, Mrs. Cooper, that you filed a claim with the District of Columbia Workmen's Compensation Department here in Washington, D. C.? A. Did I file one?

Q. Yes? A. I don't quite understand.

12 Q. Well, did you or your attorney, on your behalf, file a claim with the Workmens Compensation Department here in the District of Columbia? A. They sent me the papers and I turned them over to my attorney.

Q. And did you sign any of those papers? A. Yes, sir; I did.

Q. And did you return them to your attorney? A. I signed them in his office and I did not have to return them.

Q. Was your attorney then Mr. John J. Spriggs, Jr.? A. Yes, sir; and he said I was to leave them there.

Q. Now, as a result of filing that claim in the Workmens Compensation Bureau did you have a hearing? A. Yes, sir.

Q. Before one of the Examiners? A. Four December 1961, I had a conference.

Q. And was your attorney present with you? A. Yes; he was.

Q. And as a result of that hearing was it decided that you were not the wife of Mr. Cooper at the time he was hurt and later died?

13 A. That is what they said.

Q. Did they at that time make an award for the children of Mr. Cooper and yourself? A. I think they made an award at that time. Anyway I got a letter later stating the amount of money set aside for the children.

Q. And did they also make an award payable to you? A. No.

14 Q. Are you employed at the present time? A. No; I am not.

Q. Have you been employed since your husband died? A. No; I have no way to take care of the children. Baby-sitting is too expensive.

* * * * *

[Filed May 31, 1962]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Super Salvage Company, a corporation, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 (H) local rules of this court, moves this court for an order granting summary judgment in its favor and as its reasons therefore refers the court to the attached Statement of Material Facts not in Dispute, Memorandum of Points and Authorities and Affidavit.

/s/ John F. Cooney
Attorney for Defendant

[Certificate of Service]

[Filed May 31, 1962]

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. The defendant is a corporation doing business in the District of Columbia and at all times mentioned in the complaint was the employer of Donald Cooper, deceased.

2. The plaintiff claim was rejected by the Workmen's Compensation Commission.

3. On July 13, 1961, said Donald Cooper was injured within the scope of his employment.

/s/ John F. Cooney
Attorney for Defendant

[Filed May 31, 1962]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

1. The defendant Super Salvage Company was the employer of Donald Cooper on July 13, 1961, when he sustained an injury while in the course of his employment.

2. Pursuant to provisions of the Longshoremen's & Harbor Workmen's Compensation Act 33 U.S.C.A. 901 et seq the provisions of which have been made applicable to the District of Columbia by the District of Columbia Code § 36-501 (supp. for 1959), defendant had in effect a policy of insurance covering his employees and their dependents for injuries sustained in the course of their employment.

3. By virtue of § 33 U.S.C.A. 905 the exclusive liability of defendant to the plaintiff is measured by and limited to the applicable provisions of the Longshoremen's & Harbor Workmen's Compensation Act. The same is true of the wife. (see Smith & Company v- Coles,) 100 US App. D.C. 68-242 F2d 220 certiorari denied 354 US 914 (1957) accordingly this suit may not be maintained and defendant is entitled to summary judgment.

/s/ John F. Cooney
Attorney for Defendant

[Filed May 31, 1962]

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

1. Bernard Gordon being first duly sworn under oath deposes and says that he is and was the President of the Super Salvage Company on July 13, 1961.

2. That on July 13, 1961, Mr. Donald Cooper was an employee of the Super Salvage Company and was injured in the course of his employment and as a result died on July 18, 1961.

3. That pursuant to the Longshoremen's & Harbor Workmen's Compensation Act he had in effect with the Hartford Accident & Indemnity Company a Workmen's Compensation Policy which covered the employee, Mr. Donald Cooper for compensation benefits pursuant to the Act being Policy No. 30 WH 790438, dated 10/13/60 to 10/13/61.

/s/ Bernard Gordon

Subscribed and sworn to before me this 18 day of May, 1962.

/s/ Robert L. Garber
Notary Public, D. C.

[Filed June 19, 1962]

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff by and through her attorney and offers the following reasons in opposition to the motion for summary judgment filed by the defendant.

1. The issues contained in the motion are Res Judicata, in that this Court has decided the identical issues against the defendant by denying defendant's motion to dismiss the complaint which was filed herein during February, 1962. No motion to reconsider the motion or any further action was taken by the defendant until the filing of the motion for summary judgment.

2. Defendant, after the motion to dismiss was denied filed an answer to the complaint which raised several questions of facts which should

not be adjudicated by the Court since the plaintiff has asked for a jury trial to determine all questions of fact.

3. Questions of fact which are material and which were created by the defendant in its answer are as follows:

(a) Defendant by its answer to paragraphs one and seven denied that the plaintiff is the widow of the deceased, which if true, would place the plaintiff outside the purview of the Workmen's Compensation Act. (See opposition to Motion to dismiss)

(b) Defendant denied Donald N. Cooper, the deceased was happily married to the plaintiff; he denied that the deceased had complained of dangerous working conditions prior to his death; denied that the defendant failed to remedy the dangerous conditions complained of by deceased; denied that on July 13th, 1961 deceased was loading scrap metal; denied he was using a crane resting on unstable foundation; denied negligence, all of which create genuine issues of material fact.

4. Complaint filed herein is outside the purview of the Workmen's Compensation Act by virtue of the defendant's own opposition to the applicability of the said Workmen's Compensation Act.

5. The Workmen's Compensation Act was not designed to allow a person to deny another person from the benefits of the Act on the one hand and then set up that same act as a defense to other remedies available to a person outside the act.

6. And for such other and further reasons set forth in the opposition to the motion to dismiss and which will be brought forth at the hearing on this motion.

Accordingly, the motion for a summary judgment should be denied.

/s/ John J. Spriggs, Jr.

* * *

[Certificate of Service]

[Filed July 13, 1962]

ORDER

This cause came before the court on the motion of defendants Jacob C. Lish and Super Salvage Company for a summary judgment together with affidavits and a statement of material facts not in dispute attached thereto and the opposition of the plaintiff to these motions and the court having heard oral argument on June 26, 1962, it is, by the Court, this 13th day of July, 1962,

ORDERED, that the motion for summary judgment on behalf of the defendants be and the same is hereby granted and final judgment for the defendants be and the same is hereby rendered.

/s/ George L. Hart, Jr.
JUDGE

[Certificate of Service]

[Filed August 13, 1962]

NOTICE OF APPEAL

Notice is hereby given this 13th day of August, 1962, that the plaintiff, Sylvia O. Cooper hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of July, 1962 in favor of the defendants, Jacob C. Lish, et al., against said plaintiff, Sylvia O. Cooper.

/s/ John J. Spriggs, Jr.
Attorney for Plaintiff

* * *

***

[Filed July 13, 1962]

ORDER

This cause came before the court on the motion of defendants Jacob C. Lish and Super Salvage Company for a summary judgment together with affidavits and a statement of material facts not in dispute attached thereto and the opposition of the plaintiff to these motions and the court having heard oral argument on June 26, 1962, it is, by the Court, this 13th day of July, 1962,

ORDERED, that the motion for summary judgment on behalf of the defendants be and the same is hereby granted and final judgment for the defendants be and the same is hereby rendered.

/s/ George L. Hart, Jr.
JUDGE

[Certificate of Service]

[Filed August 13, 1962]

NOTICE OF APPEAL

Notice is hereby given this 13th day of August, 1962, that the plaintiff, Sylvia O. Cooper hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of July, 1962 in favor of the defendants, Jacob C. Lish, et al., against said plaintiff, Sylvia O. Cooper.

/s/ John J. Spriggs, Jr.
Attorney for Plaintiff

* * *

***

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,285

SYLVIA O. COOPER,

Appellant,

v.

JACOB LISH
(Agent for)
SUPER SALVAGE COMPANY,
a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN F. COONEY

1000 Vermont Avenue, N. W.
Washington 5, D. C.

Attorney for Appellee.

STATEMENT OF QUESTION PRESENTED

In the opinion of appellee, the question is:

In a negligence suit for loss of consortium and support did the court below properly enter summary judgment for the defendant on the ground that the action was barred by the District of Columbia Workmen's Compensation Act where the uncontroverted facts established that plaintiff's decedent was fatally injured while acting within the scope of his employment and that the defendant employer, at the time of the accident, maintained a policy of insurance providing workmen's compensation coverage for plaintiff's decedent?

INDEX

TABLE OF CASES

OTHER REFERENCES

---

* Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,285

SYLVIA O. COOPER,

Appellant,

v.

JACOB LISH
(Agent for)
SUPER SALVAGE COMPANY,
a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNTERSTATEMENT OF THE CASE

This is an appeal by appellant, plaintiff below, and heareafter referred to as plaintiff, from a final order of the United States District Court granting the motion of appellee, defendant below, and hereafter referred to as defendant, for summary judgment (J.A. 20).

In her complaint, filed on January 3, 1962, plaintiff alleged that she was the widow of one Donald N. Cooper and that she was suing plaintiff's former employer, defendant Super Salvage Company, for negligence in causing the death of Donald N. Cooper. Plaintiff alleged that Donald N. Cooper, while acting within the scope of his employment as a crane operator for the defendant employer, was fatally injured as a result of the defendant employer's negligence. Plaintiff further alleged that as a result of the aforesaid negligence, she was deprived of the financial support and consortium of Donald N. Cooper. In her complaint plaintiff stated, in paragraph three, that the Workmen's Compensation Act* is inapplicable to her action because the Workmen's Compensation Commission rejected her claim for compensation (J.A. 1-2).

The defendant moved to dismiss the complaint on the ground that the Workmen's Compensation Act of the District of Columbia provides the exclusive remedy against an employer (J.A. 3-4). The motion was denied by the District Court on March 26, 1962 (Sirica, J.) (J.A. 10).

Defendant then filed an Answer to the Complaint admitting that Donald N. Cooper, while acting within the scope of his employment, was fatally injured, but denying any negligence or that the plaintiff was his widow. Defendant also pleaded the District of Columbia Workmen's Compensation Act as an absolute bar to the action (J.A. 10-12).

The deposition of the plaintiff, Sylvia O. Cooper, was taken by the defendant. The plaintiff testified that she went through a marriage ceremony with Donald N. Cooper on April 21, 1956, and that she obtained a divorce from her prior husband, one Joseph Dusbitt, on March 22, 1956 (J.A. 13-14). Plaintiff further testified that when she married Donald N. Cooper, she believed that he had obtained a valid divorce from his former

---

* District of Columbia Workmen's Compensation Act, D.C. Code 1961, § 36-501, adopting the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424 (1927), as amended, 33 U.S.C.A. §§ 901, et seq., herein referred to as "Workmen's Compensation Act."

wife (J.A. 14-15). She also stated that Donald N. Cooper died as a result of injuries he sustained while working for defendant; that she filed a Workmen's Compensation claim; that at the hearing on said claim it was determined that she was not the wife of Donald N. Cooper; and that her claim was denied but an award was made to Mr. Cooper's children (J.A. 15-16).

Thereafter, the defendant filed a motion for summary judgment, setting forth the undisputed facts that Donald N. Cooper was injured within the scope of his employment; that the defendant was plaintiff's employer; and that plaintiff's claim was rejected by the Workmen's Compensation Commission (J.A. 16-17). The motion was granted by the District Court on July 13, 1962 (Hart. J.) (J.A. 20), and this appeal followed.

STATUTES INVOLVED

Section 5 of the Longshoremen's and Harbor Workers' Act, 33 Stat. 1424 (1927), as amended, 33 U.S.C.A. §§ 901, et seq., adopted as the District of Columbia Workmen's Compensation Act, D. C. Code 1961, §36-501, provides as follows:

> "The liability of an employer shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from employer at law or admiralty on account of such injury or death except that if an employer fails to secure payment of compensation as required by this Act, an injured employee or his legal representative in case death results from the injury may elect to claim compensation under this Act, or to maintain his action at law for damages on account of such injury or death."

SUMMARY OF ARGUMENT

The Court below correctly granted defendant's motion for summary judgment since the pleadings established that there was no genuine issue as to any material fact and that the defendant was entitled to judgment as a matter of law.

The suit below was a negligence action by the plaintiff (appellant herein) for loss of consortium and support resulting from a fatal injury to her alleged husband. Plaintiff alleged, and it was undisputed, that her decedent was injured while acting within the scope of his employment and under the direction of his employer, the defendant (appellee herein). It was further undisputed that there was a policy of workmen's compensation insurance covering the decedent at the time of his injury.

These uncontroverted material facts required the court below to enter summary judgment for the defendant since the District of Columbia Workmen's Compensation Act limits an employer's liability for his employee's injuries to statutory compensation except where the employer fails to secure such compensation. Thomas v. Central Linen Co., 105 U.S. App. D.C. 49, 263 F. 2d 495 (1959); Smither & Company, Inc. v. Coles, 100 U.S. App. D.C. 68, 242 F. 2d 220, certiorari denied, 354 U.S. 914 (1957).

Plaintiff's only other argument is that the court below was without power to grant defendant's motion for summary judgment since defendant's earlier motion to dismiss had been denied by a different judge. The argument is without merit since the motion to dismiss, like the common law demurrer, presented questions different from the motion for summary judgment. In any event, it is well established that restraint upon a successor judge respecting prior interlocutory orders is one of comity only, and in no way infringes upon the second judge's power to act. See Bowles v. Wilkie, 175 F. 2d 35 (7th Cir. 1949); Dictograph Products Co. v. Sonotone Corp., 230 F. 2d 131 (2d Cir. 1956), rehearing denied, 231 F. 2d 867, certiorari dismissed, 352 U.S. 883.

ARGUMENT

THE COURT BELOW CORRECTLY GRANTED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SINCE THE UNDISPUTED FACTS ESTABLISHED THAT PLAINTIFF'S EXCLUSIVE REMEDY AGAINST DEFENDANT WAS PROVIDED BY THE WORKMEN'S COMPENSATION ACT.

It is firmly established that a motion for summary judgment should be granted where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Harshaw v. Hollister, 105 U.S. App. D.C. 144, 265 F. 2d 128 (1959); Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F. 2d 766 (1950).

Indeed, this Court recently ruled that summary judgment was properly entered for the employer where the complaints of the employee and his wife raised no genuine issues of material fact and were barred by the District of Columbia Workmen's Compensation Act. Thomas v. Central Linen Co., 105 U.S. App. D.C. 49, 263 F. 2d 495 (1959).

The pleadings before the court below plainly established (1) that there was no genuine issue of material fact and (2) that as a matter of law the defendant was entitled to judgment. The entry of summary judgment for the defendant was therefore correct.

A. The Undisputed Facts

In support of its motion for summary judgment, defendant submitted the following Statement of Material Facts Not in Dispute:

1. The defendant is a corporation doing business in the District of Columbia and at all times mentioned in the complaint was the employer of Donald Cooper, deceased.

2. The plaintiff claim was rejected by the Workmen's Compensation Commission.

3. On July 13, 1961, said Donald Cooper was injured within the scope of his employment.

These facts were not controverted by plaintiff. Therefore, pursuant to Rule 9 (h) of the Rules of the United States District Court for the District of Columbia, the trial court properly assumed these facts to be admitted by the plaintiff.

B. On the Basis of the Undisputed Facts, Defendant Was Entitled to Judgment as a Matter of Law

Section 5 of the Workmen's Compensation Act, 33 U.S.C.A. § 905, provides as follows:

> "The liability of an employer shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from employer at law or admiralty on account of such injury or death except that if an employer fails to secure payment of compensation as required by this Act, an injured employee or his legal representative in case death results from the injury may elect to claim compensation under this Act, or to maintain his action at law for damages on account of such injury or death." (Emphasis added.)

In the face of uncontroverted evidence that — (1) Donald N. Cooper, through whom plaintiff was claiming, was an employee of defendant; (2) that there was a Workmen's Compensation policy in effect covering Mr. Cooper; and (3) that Mr. Cooper was injured in the course of his employment — the court below had absolutely no alternative but to grant summary judgment for the defendant. See Thomas v. Central Linen Company, supra; Smither & Company, Inc. v. Coles, 100 U.S. App. D.C. 68, 242 F. 2d 220, certiorari denied, 354 U.S. 914 (1957).

Assuming plaintiff to have been the wife of Donald N. Cooper, as she alleged in her complaint, any action for loss of consortium or support would be barred by Section 5 of the Workmen's Compensation Act. Smither & Company, Inc. v. Coles, supra. Assuming she was not his wife,

a fortiori, she would have no cause of action, not only because of Section 5, but because she would have no legally recognized rights arising out of Cooper's death.

In Smither & Company, this Court, sitting en banc, reversed the earlier three-judge panel decision of Hitaffer v. Argonne Company, 87 U.S. App. D.C. 57, 183 F. 2d 811, certiorari denied 340 U.S. 852 (1950), and ruled that the Workmen's Compensation Act barred the wife of an injured employee from suing his negligent employer. The Court emphasized that the "keystone" of the Workmen's Compensation Act was the "exclusiveness of the remedy" therein provided and stated that "* * * anything that tends to erode the exclusiveness of either the liability or the recovery strikes at the very foundation of statutory schemes of this kind, * * *". 100 U.S. App. D.C. at 70, 242 F. 2d at 222.

In view of this Court's decision that the wife of an injured employee is barred by the Workmen's Compensation Act from suing the employer for loss of consortium, it would be unthinkable to permit a woman not his wife to maintain such an action.

Finally, plaintiff appears to argue that the latter half of Section 5 of the Workmen's Compensation Act, supra, allows the injured employee or one claiming through him the right to pursue his or her common law remedies if a compensation award is in fact not made (Argument III, Brief for Appellant. However, it is clear that a common law action may be maintained only if the employer does not comply with the requirements of the Act. Such compliance was established by an uncontroverted affidavit attached to defendant's motion for summary judgment showing a policy of workmen's compensation insurance covering the deceased Cooper to be in effect. Plainly, the denial of a claim by the Workmen's Compensation Commission does not constitute non-compliance by the employer with the Workmen's Compensation Act.

C. The Denial of Plaintiff's Motion to Dismiss Did Not Bar the Granting of Plaintiff's Subsequent Motion for Summary Judgment

Plaintiff contends that the District Court was without power to grant defendant's motion for summary judgment because the defendant's prior motion to dismiss had been denied. (Argument II, Brief for Appellant.)

This argument ignores the distinction between a motion to dismiss, and a motion for summary judgment. The test on a motion to dismiss for failure to state a claim is whether the complaint on its face is legally sufficient, much the same as the common law demurrer. See **2 Moore's Federal Practice 2244** (1953). However, a motion for summary judgment may be supported, as was the motion in the instant case, by matters outside the pleadings, and in such case the test is whether the matters before the court raise any genuine issue as to any material fact. See **6 Moore's Federal Practice 2015** (1953). The question presented on the summary judgment motion therefore differed materially from the question presented on the motion to dismiss, and the earlier denial of the motion to dismiss did not foreclose the subsequent entry of summary judgment.

In any event, restraint upon a successor judge with respect to earlier interlocutory orders is one of comity only, and in no way infringes upon the power of the second judge to act. See Bowles v. Wilkie, 175 F. 2d 35 (7th Cir. 1949); Dictograph Products Co. v. Sonotone Corp., 230 F. 2d 131 (2d Cir. 1956) rehearing denied, 231 F. 2d 867, certiorari dismissed, 352 U.S. 883.*

---

* Collateral estoppel or res judicata principles, cited by plaintiff, do not apply since the denial of plaintiff's motion to dismiss did not constitute an adjudication of the merits of the case. The order constituted no more than an interlocutory ruling that the complaint, on its face, was not legally insufficient.

CONCLUSION

Wherefore, the judgment of the court below should be affirmed.

Respectfully submitted,

JOHN F. COONEY

1000 Vermont Avenue, N. W.
Washington 5, D. C.

Attorney for Appellee.